No. 20481

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CARROLL-NASLUND DISPOSAL, INC., RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
HAROLD B. SHORE,
Attorneys,

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is directed to respondent's contention that the Board violated its own self-imposed jurisdictional standards in asserting jurisdiction over respondent's operations.

1. The existence of the Board's statutory jurisdiction over respondent's activities has been demonstrated in the Board's opening brief (pp. 9-11) and is conceded by respondent (Resp. Br. p. 4). Accordingly, respondent may not successfully argue that its violations of the Act should be beyond the reach of

the law merely because its volume of business does not bring it within the "self-limiting standards gratuitously adopted by the Board itself." *N.L.R.B.* v. *W.B. Jones Lumber Co.*, 245 F. 2d 388, 391 (C.A. 9). As this Court has repeatedly held, ". . . where the Board has [statutory] jurisdiction, as it had in this case, whether such jurisdiction should be exercised is for the Board, not the Courts, to determine." *N.L.R.B.* v. *Stoller*, 207 F. 2d 305, 307 (C.A. 9). Accord: *N.L.R.B.* v. *Jones, supra,* at 391; *N.L.R.B.* v. *Carpenters Local No. 2133, etc., et al.*, No. 20,324, decided February 10, 1966 (C.A. 9). This Court has, therefore, properly held that such a decision is "not justiciable," in the absence of extraordinary circumstances such as "unjust discrimination . . . in the consideration of one case and refusal to hear others unfair or lacking in due process." *N.L.R.B.* v. *Jones, supra,* 245 F. 2d at 391. Since no such dicrimination is present here, respondent's contention must fail. For where "the Board acts within the scope of its statutory authority, the question of whether or not it chooses to act within the established limits is one of policy. The courts are not vested with authority to control such exercise of prerogative. Furthermore, [respondent] has no right to challenge the exercise or non-exercise of any jurisdiction with which Congress has endowed the Board." *Ibid.*

2. Respondent does not advance its case by its reliance on *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451. (C.A. 4), cert. denied, 377 U.S. 925. That case is wholly inapposite, since it involved the extent

of the power granted by Congress to the Secretary of Labor under the provisions of the Fair Labor Standards Act. 63 Stat. 917, 29 U.S.C.A. 213(a)(2).[1] It is clear from a comparison of the relevant language of the Fair Labor Standards Act with that of the National Labor Relations Act—the jurisdiction of the latter extending to "any person . . . engaging in any unfair labor practice . . . affecting commerce" (Section 10(a))—that the jurisdiction of the NLRA is by far the more extensive. As the court noted in the *Trashmoval* case, 323 F. 2d at 456:

> It is uniformly recognized that in enacting the Fair Labor Standards Act of 1938 the Congress did not exercise the full scope of its power to regulate commerce. [citing, *inter alia*, *Mitchell* v. *H.B. Zachry Co.*, 362 U.S. 310, 314-316]. The rejection of a proposal to adopt language making the Act applicable to employees "engaged in commerce in any industry affecting commerce" instead of the enacted language which applied the regulation of hours and wages to "each of his employees who is engaged in commerce or in the

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[1] The cited statutory provisions, which were at issue in the *Trashmoval* case, exempt from the wage, hour and record-keeping requirements of that statute

> . . . any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .

> production of goods for commerce" (29 U.S.C.A. §§ 206, 207) indicated a Congressional purpose to leave local business to regulation by the states. [Citations omitted].

By way of contrast, Congress, in establishing the Board's jurisdiction under the National Labor Relations Act, used virtually the exact language it later rejected in the FLSA. Hence, as this Court pointed out in *N.L.R.B.* v. *Inglewood Park Cemetery Association*, No. 19,741, decided January 14, 1966, under the NLRA. " 'Congress intended to and did vest in the Board the fullest *jurisdictional* breadth permissible under the Commerce Clause,' " quoting from *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226. (Emphasis in this Court's opinion).

It is clear, moreover, that the scope of judicial review under the FLSA is far greater than that established by Congress in the NLRA. As the Court noted in *Wirtz* v. *Modern Trashmoval*, *supra* at 456, "In the absence of a provision for administrative determination, the primary responsibility for the application of the [Fair Labor Standards] Act to particular fact situations has been vested in the courts . . . ." In contrast, the National Labor Relations Act " 'establishes a framework within which *the Board* is to determine whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress . . . .' " *N.L.R.B.* v. *Inglewood Park*, *supra*, quoting *N.L.R.B.* v. *Reliance Fuel*, *supra*, 371 U.S. at 226. (Emphasis added).

Finally, the Court in *Modern Trashmoval, supra,* was dealing with a specific Congressional intent to exempt retail business from the coverage of the FLSA. The question before this Court is a far more limited one: namely, whether the Board, in deciding whether to exercise the right granted to it by the Congress to take jurisdiction over this employer's business, should be compelled, as a matter of law, to conform its decision to certain self-imposed standards for retail enterprises, rather than for nonretail establishments. As we show below, the Board's classification of respondent as a nonretail business was reasonable, and accorded with well-established Board practice.

3. For a number of years, the Board has held that its jurisdictional standards for "retail" businesses would not be applied to enterprises which sell goods or services to "*institutions*, industrial, commercial, and professional users, and *governmental* bodies." *J.S. Latta and Son*, 114 NLRB 1248, 1249. (Emphasis in Board decision). The Board's reasoning was based on the Supreme Court's decision in *Roland Electrical Company* v. *Walling*, 326 U.S. 657, 674-675, in which the Court had noted that "Retailing includes all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity or service purchased," but that sales to commercial consumers or governmental bodies were more properly denomi-

nated as "wholesale." *Ibid* at 674-675.[2] Accordingly, in *Latta, supra,* the Board held that its nonretail standard of jurisdiction should be applied to an employer engaged chiefly in the sale of furniture and laboratory equipment to public school districts. See *Harris & Harris, d/b/a Culligan Soft Water Service,* 149 NLRB 2, 3; *Labor Relations Commission, Massachusetts,* 138 NLRB 381, 382-383; *Truman Schulp,* 145 NLRB 768, 769. In the instant case, about $23,000 of respondent's $88,000 gross annual income is derived from sales of its service to business and commercial users. Accordingly, even if the remainder of its income be considered retail (but see pp. 8-9, n. 3, *infra*) the Board properly applied its nonretail standard to respondent, since, under Board policy, "where, as here, an employer is engaged in combination retail and nonretail operations, the Board's nonretail standards will be applied if the employer's income from such operations exceeds *de minimis.*" *Cemetary Service Corporation,* 149 NLRB 604, 605-606. Accord: *Appliance Supply Co.,* 127 NLRB 319, 320, and cases cited.

In sum, the Board's decision to apply its nonretail standard to respondent's business is reasonable, is predicated in part on a decision of the United States Supreme Court, is in accordance with a policy that

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[2] Reliance by the Secretary of Labor on the "business use" test of *Roland Electrical Company* is no longer possible, because Congress passed the 1949 amendments to Section 13(a)(2) of the Fair Labor Standards Act in order to eliminate the "business use" test, insofar as it applied to the FLSA. See *Modern Trashmoval, supra,* 323 F. 2d at 464-465.

has been applied consistently to employers whose business operations are similar to those of respondent, and is well within the statutory powers granted to the Board by the Congress. Accordingly, the holdings of this Court (*supra*, p. 2) plainly compel a finding that the Board properly asserted jurisdiction over respondent's operations.

4. Respondent's contention, based on *Modern Trashmoval, supra* that the Board's retail standard should apply to its operations, was not mentioned at the hearing or in its brief to the Trial Examiner, was never raised at any stage of the proceedings before the Board, and is now presented to this Court for the first time, clearly as an afterthought. Hence, should the Court find merit to the argument, it would be appropriate that the case be remanded to the Board for full consideration of the issues raised by *Modern Trashmoval.* Although the Board, on the record before it, reasonably considered respondent to be a non-retail establishment, it should have an opportunity to reconsider the matter rather than have its petition for enforcement denied on the basis of an argument never presented to it.[3]

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[3] Subsequent to the filing of the Board's opening brief herein, the Supreme Court decided *Idaho Sheet Metal Works* v. *Wirtz*, 34 Law Week 4167 (February 24, 1966). The opinion contains dictum referring with approval to the Fourth Circuit's construction in the *Modern Trashmoval* case of the retail exemption from FLSA coverage. 34 Law Week at 7171, n. 17. Inasmuch as the issues raised in *Modern Trashmoval* do not affect the Board's statutory jurisdiction over respondent, we do not deem it necessary to make a detailed refutation of the court's finding in that case that the employer was exempt

CONCLUSION

For the reasons stated above, as well as those stated in our main brief, we respectfully request that the

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from the coverage of the Fair Labor Standards Act. It should be noted, however, that, unlike the employer in *Modern Trashmoval*, respondent in the case at bar was performing its services pursuant to an exclusive contract with the City of Lewiston, which alone, under local ordinance, has control over the collection of refuse within its boundaries. As the holder of an *exclusive franchise* to perform an essential public service, respondent's business, unlike Modern Trashmoval's, may be likened to that of a public utility. Trash collection services are so regarded by the United States Bureau of the Budget and by a recent District Court decision. Standard Industrial Classification Manual, 1957 Ed., pp. 142-143; *Wirtz* v. *DeBoer Bros.*, 51 LC ¶ 31,695, pp. 42,437-42,438 (D.C., N.D. Ill.). Since water, gas and electric utilities were specifically classified as nonretail by the 1942 Wage and Hour Manual (Sec. 29-31) and were clearly considered to be nonretail by the sponsors of the 1949 amendments to Section 13(a)(2) of the FLSA, it may well be that respondent is subject to the FLSA, even though Modern Trashmoval fell within the exemption. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295; *Goldberg* v. *Roberts*, 291 F. 2d 532, 533-534 (C.A. 9).

Viewed as a public utility, respondent might fall within the Board's self-imposed jurisdictional standard for that type of business. Thus, the Board has declared that it will "assert jurisdiction over all public utilities which do a gross volume of business of at least $250,000 or which have an outflow or inflow of goods, materials, or services, whether directly or indirectly across state lines, of $50,000 or more per annum." *Sioux Valley Empire Electric Association*, 122 NLRB 92, 94. As the record herein shows, respondent's indirect outflow of services across the State line was in excess of $50,000 (Pet. Br. pp. 12-13), and hence the Board's jurisdictional standard which is applied to public utilities may be applicable.

Court issue a decree enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
HAROLD B. SHORE,
Attorneys,

National Labor Relations Board.

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CERTIFICATE

The undersigned hereby certifies that he has examined the provisions of Rules 18 and 19 of this Court and that in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

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